

STATE OF MICHIGAN

MICHIGAN SUPREME COURT

TAMIKA HARRELL/APPELLEE,

Plaintiff,

vs.

COURT OF APPEALS NO: 318744
LOWER COURT NO.: 12-003939-NF

TITAN INSURANCE COMPANY/APPELLANT,

Defendant.

MARK M. GRAYELL (P37069)
Attorneys for Plaintiff/Appellee
BERNSTEIN & BERNSTEIN
18831 West 12 Mile Road
Lathrup Village, Michigan 48076
(248) 350-3700

RONALD M. SANGSTER, JR. (P39253)
Attorney for Defendant/Appellant
LAW OFFICES OF RONALD M. SANGSTER
901 Wilshire Drive, Suite 230
Troy, MI 48084
(248) 269-7040

**PLAINTIFF/APPELLEE'S ANSWER TO DEFENDANT
APPELLANT'S APPLICATION FOR LEAVE TO APPEAL**

EXHIBITS

ORAL ARGUMENT REQUESTED

PROOF OF SERVICE

Prepared by:

Mark M. Grayell (P37069)
BERNSTEIN & BERNSTEIN, P.C.
18831 West Twelve Mile Road
Lathrup Village, MI 48076
(248) 350-3700

TABLE OF CONTENTS

Index of Authorities	iii.
Statement of Jurisdiction	iv.
Counter Statement of Question Presented	v.
Facts	1,2,3
Legal Argument on the Issue of Constructive Ownership"	3,4,5,6,7
Relief Requested	8

EXHIBITS

Deposition of Tanika Harrell....	Exhibit 1
Deposition of Arville Livingston	Exhibit 2
Transcript Titan Insurance Motion for Summary Disposition	Exhibit 3
Transcript of Bench Trial	Exhibit 4
Court's Findings of Fact and conclusions of Law	Exhibit 5

INDEX OF AUTHORITIES

CASES

<u>Ardt v Titan,</u> 233 Mich App 685 (1999)	5
<u>DMC v Titan Insurance Company,</u> 284 Mich App 49209	7
<u>Frishett v State Farm Mutual Automobile Insurance Company</u> 378 Mich 733 (1966)	iv.
<u>Malooly v Heating and Vent Corp</u> 270 Mich 240 (1935)	iv.
<u>Ringewold v Bos,</u> 200 Mich App 131 (1993).....	7
<u>Sanborn v Progressive Michigan Ins Co,</u> (C/A #241250; 12/2/2013)[RB Item #2416],	6
<u>Twichel v MIC Gen Ins Corp.,</u> 469 Mich 524 (2004)	3
Other Authorities MRC 2.116(c)(10)	

**STATEMENT OF JURISDICTION
AND STANDARD OF REVIEW**

This Court has jurisdiction over this matter pursuant to MCR 7.203(A). The final judgment or Order of Wayne County Circuit Court was entered on October 7, 2013, following a bench trial that resulted in a finding that Plaintiff/Appellee Tanika Harrell was not an "owner" of the uninsured motor vehicle titled in the name of her husband at the time of the motor vehicle accident on June 17, 2011, thereby entitling Plaintiff/Appellee to Michigan no-fault insurance benefits.

The grounds listed in MCR 7.302(B) reflect a basic policy of the Supreme Court that energies should be devoted to reviewing important matters and policing the administration of the judicial system, rather than be dissipated in attempts to correct every possibility of error in the decisions of the lower courts.

This basic policy can be implemented effectively only through the wise exercise of the Supreme Court's discretion in its determinations of which cases will be formally heard by the court. Therefore it should not be assumed that leave to appeal will be routinely granted in every case that might come under one of the specified grounds.

The court has carefully disavowed any thought that a denial of leave to appeal may be considered as any indication that the Supreme Court affirms or even agrees with the decisions entered Malooly v Heating and Vent Corp. 270 Mich 240 (1935) and Frishett v State Farm Mutual Automobile Insurance Company, 378 Mich 733 (1966).

COUNTER STATEMENT OF QUESTION PRESENTED

- I. WHETHER THE COURT OF APPEALS AFTER A REVIEW OF THE RECORD PROPERLY CONCLUDED THAT PLAINTIFF/APPELLEE TAMIKA HARRELL WAS NOT THE "CONSTRUCTIVE OWNER" OF THE MOTOR VEHICLE THAT SHE WAS OPERATING AND THAT SHE WAS PROPERLY ENTITLED TO MICHIGAN NO-FAULT BENEFITS FROM THE NO-FAULT POLICY ISSUED BY DEFENDANT/APPELLANT.

Plaintiff / Appellee answers: "Yes"

Defendant / Appellant answers: "No"

Court of Appeals: "Yes"

COUNTER STATEMENT OF FACTS

This cause of action arises out of a first party claim for Michigan No-Fault Insurance Benefits on behalf of Plaintiff/Appellee, Tamika Harrell, for a motor vehicle collision that occurred on June 17, 2011.

It is agreed to by the parties through their respective pleadings, that Plaintiff/Appellee, Tamika Harrell, was operating and uninsured motor vehicle that was titled in her husband Arville Livingston's name. The police report indicates that as Plaintiff/Appellee was proceeding northbound on Southfield Road, she was rear ended by another motor vehicle that upon information and belief was likewise uninsured.

During the collision, Plaintiff/Appellee, Tamika Harrell, sustained serious and permanent personal injury to her cervical and lumbar spine necessitating extensive medical care and treatment and ongoing work disability.

Given the uninsured status of Plaintiff's/Appellee's motor vehicle, extensive discovery has taken place concerning Plaintiff/Appellee, Tamika Harrell's prior use of the motor vehicle.

The sworn testimony of Plaintiff/Appellee, Tamika Harrell confirms that prior to the motor vehicle collision, she was lawfully married to Arville Livingston. It is also agreed to by the parties herein, that the subject 2008 Lincoln motor vehicle was titled in her husband's name. (Deposition Transcript, Tamika Harrell, p. 7, lines 4, 6).

Plaintiff/Appellee likewise testified that she has driven her husband's uninsured motor vehicle before the date of loss, "periodically when he lets me." (Deposition Transcript, Tamika Harrell, p.7, line 14). Tamika Harrell/Appellee testified that she did not have her own set of keys to the motor vehicle and that her husband's permission

was required to drive the motor vehicle. (Deposition Transcript, Tamika Harrell, p. 7, lines 15-18).

At the time of the motor vehicle collision, Plaintiff/Appellee was employed as a home healthcare aid as well as an exotic dancer at a local nightclub. Tamika Harrell/Appellee testified that her husband was uncomfortable with her driving the motor vehicle to the nightclub and that "he really wouldn't let me take it to the club and drive to the club." (Deposition Transcript, Tamika Harrell/Appellee, p. 11, lines 24-25). Tamika Harrell /Appellee further testified that in the month preceding the motor vehicle collision, "I probably had drove it a couple of times". (Deposition Transcript, Tanika Harrell/Appellee, p. 14, lines 13-14).

Tamika Harrell/Appellee further testified that her husband, "put me on restrictions from driving it, you know, because of my license situation and stuff like that." Tamika Harrell/Appellee further testified that in order to drive the subject motor vehicle, she had to get the keys from her husband. (Deposition Transcript, Tamika Harrell/Appellee, p. 24, lines 20-25). Plaintiff/Appellee further testified that she had probably driven the motor vehicle at least six times prior to the subject collision but, not too much more than that. (Deposition Transcript, Tamika Harrell/Appellee p. 52, line 5.)

In an effort to clarify Plaintiff's/Appellee's prior use of the motor vehicle, the deposition of Arville Livingston was likewise taken. Mr. Livingston confirmed that he was the titled owner of the 2008 Lincoln motor vehicle. (Deposition Transcript, Arville Livingston, p. 4, lines 7-21.)

Mr. Livingston further testified that Tamika Harrell/Appellee needed his permission to drive the Lincoln and that she did not have her own set of keys to the vehicle. (Deposition Transcript, Arville Livingston, p. 8, lines 3, 18.)

Mr. Livingston further testified that he was uncomfortable with Tamika Harrell /Appellee taking the car to the nightclub for the evening shift. (Deposition Transcript, Arville Livingston, p. 9, line 12.) Mr. Livingston further testified that normally he would drive her wherever Tamika Harrell/Appellee needed to go but that sometimes he was tired and too lazy to get up and I'll say, "yeah go ahead," and I give her the keys. (Deposition Transcript, Arville Livingston, p. 10, lines 1-8.)

Mr. Livingston further testified that he could not give an exact amount of times that Tamika Harrell/Appellee drove the 2008 Lincoln between June 2008 and June 2011. It was possibly twice if not three times per year. (Deposition Transcript, Arville Livingston, p. 10, lines 16-17.)

Arville further testified that he did not buy the car specifically for Tamika Harrell/Appellee to use. (Deposition Transcript, Arville Livingston, p. 16, lines 1-12.)

I. LEGAL ARGUMENT

In *Twichel v. MIC Gen Ins Corp.* 469 Mich 524 (2004) the court stated that under the No-Fault Act, the focus of the ownership issue should be on "the nature of the person's right to use the vehicle," not whether the person used the car for over 30 days. *Twichel*, 469 Mich at 530.

A. MOTOR VEHICLE CODE DEFINITION

Prior to 1988, the Michigan No-Fault Act did not contain a definition of "owner".

However, the Michigan Motor Vehicle Code has always contained a definition of owner. Therefore, prior to 1988, appellate cases sometime refer to the Motor Vehicle code definition of owner, which is set forth in MCL 257.37 and which states as follows:

"MCL 257.37 – 'Owner' means any of the following:

- (a) *any person...renting a motor vehicle or having the exclusive use thereof, under a lease or otherwise, for a period that is greater than 30 days.*
- (b) *... a person who holds the legal title of a vehicle."*

Pursuant to this definition, a person could be deemed an owner even if they did not hold actual title of the vehicle. Such a person is sometimes referred to as a "statutory" owner. To qualify as a statutory owner under the Motor Vehicle Code definition, a person would have to have the *exclusive use of the motor vehicle*. This was a fairly stringent requirement. When the Legislature amended the no-fault law to include its own definition of owner, the statutory owner concept was broadened so as to include a larger group of individuals. The no-fault definition of "owner" is discussed below.

B. NO-FAULT STATUTORY DEFINITION

Section 3101(2)(g) of the Michigan no-fault law defines owner as applying to three classes of individuals enumerated in the statute. This section states in pertinent part:

"Section 3101(2)(g) – 'Owner' means any of the following:

- (i) *a person renting a motor vehicle or having the use thereof under a lease or otherwise, for a period of that is greater than 30 days.*

(ii) a person who holds the legal title to a vehicle, other than a person Engaged in the business of leasing motor vehicles who is the lessor of a motor vehicle pursuant to a lease providing for the use of the motor vehicle by the lessee for a period that is greater than 30 days; and (iii) a person who has the immediate right of possession of a motor vehicle under an installment sale contract."

C. OWNERSHIP OF PROPRIETARY USE

In the case of Ardt v Titan, 233 Mich App 685 (1999), the Court of Appeals discussed, for the first time, the kind of motor vehicular "use" that would be sufficient to satisfy the statutory definition of "owner." The question was important because if Plaintiff was deemed an owner of the motor vehicle in question he would be disqualified from no-fault benefits for failing to insure the vehicle pursuant to the disqualification provisions of 3113 discussed in Chapter 3. In discussing this issue, the Court made it clear that the injured person need not actually "use" a vehicle for more than 30 days before he will be considered an owner. Rather, the focus is on whether there was use of the vehicle in a way that comports with the concepts of ownership. In this regard, the Court in Ardt v Titan stated:

"The statutory provisions at issue operate to prevent users of motor vehicles from obtaining the benefits of personal protection insurance without carrying their own insurance through the expedient of keeping title to their vehicles in the names of family members. Because we infer from these provisions that they were enacted in furtherance of the sound public policy imperative that users of motor vehicles maintain appropriate insurance for themselves as indicated by

their actual patterns of usage, we hold that 'having the use' of a motor vehicle for purposes of defining 'owner' ... means using the vehicle in ways that comport with concepts of ownership. This provision does not equate ownership with any and all uses for 30 days, but rather equates ownership with 'having the use' of a vehicle for that period. Further, we observe that the phrase 'having the use thereof' appears in tandem with references to renting or leasing. These indications imply that ownership follows from proprietary or possessory usage as opposed to merely incidental usage under the direction or with the permission of another." (pg. 690-691)

In a footnote, the Court explained that a "spotty and exceptional pattern" of usage would not suffice. However, "the regular pattern of unsupervised usage" may well support a finding that a person was an owner for purposes of the No-Fault Act. In the *Ardt* case, a genuine issue of material fact existed regarding this issue, thereby requiring jury determination of the ownership question. In *Sanborn v Progressive Michigan Ins Co*, (C/A #241250; 12/2/2013)[RB Item #2416], the Court of Appeals applying the *Ardt* doctrine, concluded that the plaintiff was, as a matter of law, the "owner" of the vehicle by "having the use" thereof.

It is now clear that the injured person need not actually "use" the vehicle for more than 30 days before he/she will be disqualified for failing to insure. *Twichel v MIC General Ins Corp*, 469 Mich 524 (2004), reversing 251 Mich App 476 (2002)[RB Item #2302]. In *Twichel*, the decedent paid \$300 and was to pay the remainder at a later date. The decedent took possession of the vehicle, but the title was not signed over because of the incomplete payment. There was no insurance policy covering the

vehicle. Since the decedent was not the title holder, the question was whether he was the "owner" by virtue of use of the vehicle under 3101(2)(g)(i), even though he did not have actual use of the vehicle for more than 30 days. The Supreme Court held that actual use is not required. Relying on Ringewold v Bos, 200 Mich App 131 (1993), the Court stated:

"...it is not necessary that a person actually have used the vehicle for a thirty-day period before a finding may be made that the person is the owner. Rather, the focus must be on the nature of the person's right to use the vehicle.

"Twichel, supra at 530.

In the state of Ardt v Titan 233 Mich App 1985, (1999), regular use implies a possessory or proprietary use of the vehicle. DMC v Titan Insurance Company 284 Mich App 490 (2009) held that "permissive intermittent use does not constitute regular use.

In Twichel v MIC Gen Ins Corp, 469 Mich 524, 2004, The *Twichel* Court stated under the No-Fault Act, the focus of the ownership issue should be on, "the nature of the persons right to use the vehicle, not whether the person actually used the car for over 30 days." Twichel 469 Mich App 530.

In the case at bar, Plaintiff/Appellee, Tamika Harrell and her husband both testified that at best, Plaintiff/Appellee use of the motor vehicle was intermittent and not regular use. Plaintiff/Appellee did not have her own set of keys. In addition, Plaintiff/Appellee had to ask permission from her husband to use the motor vehicle that was lawfully titled in his name prior to using it.

Consistent with the Twichel Court, the nature of Tamika Harrell/Appellee's use of the motor vehicle must be viewed in conjunction with restrictions placed upon it by her husband not withstanding the number of times that she may have used the motor vehicle.

RELIEF REQUESTED

The record before this Honorable court establishes that the Trial court's findings of fact and conclusions of law Affirmed by the Court of Appeals are supported and Plaintiff/Appellee requests that this Honorable Court deny Defendant/Appellant's Application for Leave of Appeal. (Exhibit 6).

Respectfully Submitted,

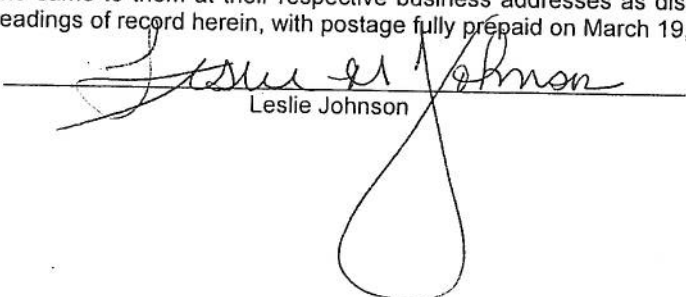
BERNSTEIN & BERNSTEIN

Mark M. Grayell (P37069)
Attorney for the Plaintiff
18831 West Twelve Mile Road
Lathrup Village, Michigan 48076
(248) 350-3700

Dated: March 19, 2015

PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing instrument was served upon the attorneys of record of all parties to the above cause of action by mailing the same to them at their respective business addresses as disclosed by the pleadings of record herein, with postage fully prepaid on March 19, 2015


Leslie Johnson